Alternative Community Living, Inc. d/b/a New Passages Behavioral Health and Rehabilitation Services *and* Local 517 M, Service Employees International Union (SEIU). Case 07–CA–099976

March 31, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND MCFERRAN

On July 25, 2014, Administrative Law Judge Mark Carissimi issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, to amend the remedy, and to adopt the recommended Order as modified and set forth in full below.[2]

For the reasons stated in his decision, we adopt the judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by: (1) failing to inform the Union, between March 25 and April 4, 2013, of the basis for its decision to refuse to ratify the tentative contract between the parties; and (2) unilaterally implementing its final contract offer to the Union at a time when the parties were not at a valid impasse in bargaining. Moreover, for the reasons explained below, and in the absence of substantive argument regarding the merits of the individual rules, we affirm the judge's finding that the Respondent violated Section 8(a)(1) by maintaining certain rules in its employee handbooks.

From at least September 2012 through about September 7, 2013, the Respondent maintained and distributed to bargaining unit employees a "Corporate Compliance & Integrity Plan Handbook" and a "Personnel Handbook" (collectively, the Handbooks). The General Counsel alleged that the Respondent violated Section 8(a)(1) by maintaining a number of facially overbroad rules in these Handbooks during this time period. As amended during the hearing, the parties entered into a joint stipulation stating: "Beginning on or about September 7, 2013, the [Handbooks] were rescinded by the Respondent, and employees were notified of the implementation of new rules on the same date."

The judge found that several of the rules were overbroad and thus violated Section 8(a)(1). The Respondent excepts solely on the grounds that there is no evidence that the rules were still in force, had been enforced, or were implemented in violation of Section 7.[3] This argument fails. It is well settled that an employer may violate Section 8(a)(1) through the mere maintenance of work rules, even in the absence of enforcement or evidence that the rules were implemented in violation of Section 7, as the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. See *Cintas Corp*., 344 NLRB 943 (2005), enfd. 482 F.3d 463 (D.C. Cir. 2007); *Lafayette Park Hotel*, 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

Additionally, the Respondent argues that it voluntarily rescinded the Handbooks, and that finding a violation would have a chilling effect on voluntary efforts by employers to resolve such matters. This argument also fails. For a repudiation to serve as a defense to an unfair labor practice finding, "it must be timely, unambiguous, specific in nature to the coercive conduct, and untainted by other unlawful conduct." *Casino San Pablo*, 361 NLRB No. 148, slip op. at 4 (2014). Additionally, there must be adequate publication of the repudiation to the employees involved and the repudiation must assure employees that, going forward, the employer will not interfere with the exercise of their Section 7 rights. *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978). Here,

[1] The Respondent implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 .2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's findings that the Respondent did not violate: (1) Sec. 8(a)(5) by refusing to execute the tentative agreement; and (2) Sec. 8(a)(1) through its: (a) "Violence-Free Work Place" rule; (b) "Derogatory Language" rule; (c) Sections a and c of the "Respect" rule; and (d) "New Passages' Compliance Reporting Facts."

[2] We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language, and in accordance with our recent decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall also substitute a new notice to conform to the Order as modified.

[3] In the absence of supporting argument, we decline to address the rules individually. See Sec. 102.46(b)(2) of the Board's Rules.

the Respondent has failed to present sufficient evidence to show that its repudiation met all of the above-specified requirements. The Respondent cannot effectively repudiate its unlawful rules simply by rescinding the Handbooks and notifying employees that it has implemented new rules. *Casino San Pablo*, supra, slip op. at 4–5, citing *DaNite Sign Co*., 356 NLRB No. 124, slip op. at 7 (2011) (affirming judge's finding that the employer did not cure its Section 8(a)(1) violation by issuing a revised handbook that deleted the unlawful rule at issue). Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(1) by maintaining the contested rules during the period at issue.[4]

AMENDED REMEDY

Having found that the Respondent unlawfully implemented its final offer, we shall, in addition to adopting the judge's order requiring the Respondent to restore the status quo ante, also order the Respondent to make unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unilateral implementation of its final offer on May 5, 2013. These amounts are to be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), Respondent shall compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating backpay awards to the appropriate calendar quarters for each employee. In addition, we have revised the Notice to inform employees that the unlawful rules have already been rescinded, and to explain the circumstances surrounding the implementation of new rules. See, e.g., *Lily Transportation*, 362 NLRB No. 54 (2015).

[4] We have not included a rescission provision in our Order given the parties' joint stipulation that the rules have already been rescinded. We note, moreover, that counsel for the General Counsel represented during the hearing that she was not seeking a rescission remedy, and that neither the General Counsel nor the Union excepted to the judge's failure to provide a rescission remedy. There is no allegation that the new rules are unlawful.

ORDER

The National Labor Relations Board orders that the Respondent, Alternative Community Living, Inc. d/b/a/ New Passages Behavioral Health and Rehabilitation Services, Pontiac, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain in good faith with Local 517 M, Service Employees International Union (SEIU) (the Union) by refusing to communicate in a timely manner the basis for positions it has taken in collective bargaining.

(b) Unilaterally implementing its final contract offer to the Union at the time when the parties were not at a valid impasse.

(c) Maintaining the following facially overbroad rules and policies:

- A dress code prohibiting "shirts with commercial or political advertisements," as in former Subsection 16.2 of the Personnel Handbook.
- Rules prohibiting employees from conducting personal business, soliciting, or distributing materials during worktime, without clarification that such activities are permitted in the workday during periods when employees may legitimately be engaged in protected activities, such as breaks and lunch periods, as in former Subsections 16.3 and 16.11 of the Personnel Handbook.
- Confidentiality rules that prohibit employees from discussing with nonemployees, or among themselves, wages, hours, and other terms and conditions of employment, as in former Subsections 16.7, 16.9, and 16.13 of the Personnel Handbook, and former Standards 3.2 and 6.2 of the Corporate Compliance & Integrity Plan Handbook.
- Rules cautioning employees about communicating about work on social networking sites as this type of communication may "lead to incidents of dignity and respect violations," as in former Subsection 16.14 of the Personnel Handbook.
- A rule directing employees to "avoid unwarranted negative criticism of colleagues … with other professionals," as in former Standard 6.1(b) of the Corporate Compliance & Integrity Plan Handbook.
- A rule forbidding the "unauthorized disclosure" on social networking sites of "nonpublic information relating to the company," and further stating that "any derogatory remarks made in

reference to or in association with New Passages and/or clients, customers, products, employees, representatives, events, findings, opinions, policies or procedures in any public format whether verbal or written will be considered slander and therefore legal restitution may be sought," as in former Subsection 16.15 of the Personnel Handbook.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regularly scheduled part-time direct care workers and case managers employed by the Employer in its various group homes located in Bay, Saginaw, Clinton, Eaton, Ingham, Jackson, Washtenaw, Oakland, Macomb, Lapeer, Livingston, and Sanilac Counties in the State of Michigan but excluding all line managers, targeted case managers, directors, human resources personnel, nurses, administration assistance, and guards and supervisors as defined in the Act and all other employees.

(b) Restore to the unit employees the terms and conditions of employment that were in effect prior to May 5, 2013, and continue them in effect until the parties reach either an agreement or a valid impasse in bargaining. Nothing herein shall require the rescission of any ratification bonus or other benefits granted after May 5, 2013.

(c) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unilateral implementation of its final offer on May 5, 2013, in the manner set forth in the amended remedy section of this decision.

(d) Compensate affected unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(e) Within 14 days after service by the Region, post at its facilities in Bay, Saginaw, Clinton, Eaton, Ingham, Jackson, Washtenaw, Oakland, Macomb, Lapeer, Livingston, and Sanilac Counties in the State of Michigan copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 8, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 31, 2015

Mark Gaston Pearce, Chairman

Harry I. Johnson, III, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with Local 517 M, Service Employees International Union (SEIU) (the Union) by refusing to communicate in a timely manner the basis for positions we have taken in collective bargaining.

WE WILL NOT unilaterally implement changes in terms and conditions of employment without first bargaining with the Union to impasse.

On September 7, 2013, we rescinded rules that were contained in our Personnel Handbook and our Corporate Compliance & Integrity Plan Handbook, and notified you that we had implemented new rules in their place. The new rules eliminate the rules that were alleged to violate Federal labor law. The National Labor Relations Board has now found that those rules were unlawful.

WE WILL NOT maintain the following overbroad rules that infringe on your right to engage in union and/or protected concerted activity:

- A dress code prohibiting "shirts with commercial or political advertisements," as in former Subsection 16.2 of the Personnel Handbook.
- Rules prohibiting employees from conducting personal business, soliciting, or distributing materials during worktime, without clarification that such activities are permitted in the workday during periods when employees may legitimately be engaged in protected activities, such as breaks and lunch periods, as in former Subsections 16.3 and 16.11 of the Personnel Handbook.
- Confidentiality rules that prohibit employees from discussing with nonemployees, or among themselves, wages, hours, and other terms and conditions of employment, as in former Subsections 16.7, 16.9, and 16.13 of the Personnel Handbook, and former Standards 3.2 and 6.2 of the Corporate Compliance & Integrity Plan Handbook.
- Rules cautioning employees about communicating about work on social networking sites as this type of communication may "lead to incidents of dignity and respect violations."
- A rule directing employees to "avoid unwarranted negative criticism of colleagues … with other professionals," as in former Standard 6.1(b) of the Corporate Compliance & Integrity Plan Handbook.
- A rule forbidding the "unauthorized disclosure" of "nonpublic information relating to the company," and further stating that "any derogatory remarks made in reference to or in association with New Passages and/or clients, customers products employees, representatives events, findings, opinions, policies or procedures in any public format whether verbal or written will be considered slander and therefore legal restitution may be sought," as in former Subsection 16.15 of the Personnel Handbook.

WE HAVE rescinded the foregoing rules on September 7, 2013.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain in good faith with the Union as the exclusive bargaining representative in the following appropriate unit:

All full-time and regularly scheduled part-time direct care workers and case managers employed by us in our various group homes located in Bay, Saginaw, Clinton, Eaton, Ingham, Jackson, Washtenaw, Oakland, Macomb, Lapeer, Livingston, and Sanilac Counties in the State of Michigan but excluding all line managers, targeted case managers, directors, human resources personnel, nurses, administration assistance, and guards and supervisors as defined in the Act and all other employees.

WE WILL restore to the unit employees the terms and conditions of employment that were in effect prior to May 5, 2013, and continue them in effect until we reach either an agreement or a valid impasse in bargaining with the Union. This does not require the rescission of any ratification bonus or any other benefits granted after May 5, 2013.

WE WILL make unit employees whole for any loss of earnings and other benefits suffered as a result of our unlawful unilateral implementation of our final offer on May 5, 2013, plus interest.

WE WILL compensate affected unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

ALTERNATIVE COMMUNITY LIVING, INC. D/B/A NEW PASSAGES BEHAVIORAL HEALTH AND REHABILITATION SERVICES

The Board's decision can be found at www.nlrb.gov/case/07-CA-099976 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Rana Roumayah, Esq., for the General Counsel.
Gregory Bator, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Detroit, Michigan on May 13–14, 2014. Local 517 M, Service Employees International Union (SEIU) (the Union) filed the charge on March 11, 2013, an amended charge on March 28, 2013, and a second amended charge on May 7, 2013.[1] The General Counsel issued the complaint on October 31, 2013.

The complaint alleges that the Union and the Respondent reached a complete agreement on the terms of a collective-bargaining agreement which the Respondent has refused to execute since March 25, 2013, in violation of Section 8(a)(5) and (1) of the Act. Alternatively, the complaint alleges that during the period from October 2011 through March 2013, the Respondent: (a) failed to cloak its representatives with the authority to enter into binding agreements; (b) reneged on the complete agreement that was reached on March 25, 2013; and (c) refused to bargain with the Union with regard to union security in violation of Section 8(a)(5) and (1). The complaint further alleges that on or about May 5, 2013, the Respondent unilaterally implemented a final offer that was dated April 17, 2013, without reaching a valid impasse in violation of Section 8(a)(5) and (1).

The complaint also alleges that the Respondent maintained a personnel handbook which contained the following rules alleged to be overly broad and facially violative of Section 8(a)(1): Rule 6.4-Violence-Free Work Place; Rule 16.2-Dress Code; Rule 16.3-Employee Honesty and Integrity; Rule 16.7-Consumer Confidentiality; Rule 16.9-Media Releases; Rule 16.11-Solicitation; Rule 16. 13-Confidentiality of New Passages Information; and Rule 16.14-Email, Voicemail, Intranet and the Internet; Rule 16.15-Facebook, Blogs, Twitter, and any other Social Networks. Finally, the complaint also alleges that the Respondent maintained the following provisions of its Corporate Compliance and Integrity Plan handbook in violation of Section 8(a)(1): Standard 3.2-Proprietary Information; Standard 5.12-Derogatory Language; Standard 6.1-Respect; and Standard 6.2-Confidentiality with Colleagues.

On the entire record, including my observation of the demeanor of the witnesses,[2] and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Pontiac, Michigan, and various other facilities in the State of Michigan provides services and housing for people with mental and/or physical disabilities and the elderly. Annually, in conducting its operations, the Respondent derives gross revenues in excess of $100,000 and purchases and receives at its Michigan facilities, products, goods, and materials valued in excess of $5000 directly from points outside the State of Michigan. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are in 2013, unless otherwise indicated.

[2] In making my findings regarding the credibility of witnesses, I considered their demeanor, the content of the testimony, and the inherent probabilities based on the record as a whole. In certain instances, I credited some, but not all, of what a witness said. I note, in this regard, that "[N]othing is more common in all kinds of judicial decisions than to believe some and not all" of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950) rev'd. on other grounds, 340 U.S. 474 (1951). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939–940 (2007).

II. ALLEGED UNFAIR LABOR PRACTICES

Background

The Respondent receives approximately 75 percent of the funding for its operations through the Community Mental Health Boards in the 11 counties in southeast Michigan in which it provides services. The Community Mental Health Boards receive their funding from the State of Michigan as part of the Medicaid program. The remaining 25 percent of the Respondent's funding comes from insurance payments for those individuals serviced by the Respondent who have private insurance.

Since 2006, the Union has been the exclusive collective-bargaining representative of the following unit employees employed by the Respondent:

> All full-time and regularly scheduled part-time direct care workers and case managers employed by the Employer at it Saginaw, Clinton, Eaton, Ingham, Jackson, Washtenaw, Oakland, Macomb, Lapeer, Livingston, and Sanilac Counties in the State of Michigan; but excluding all line managers, directors, human resource personnel, nurses, administration assistants, and guards and supervisors as defined in the Act and all other employees.

The Respondent employs approximately 315 unit employees who work under the title of "rehabilitation assistant." These employees provide personal care and community living support to individuals in a residential setting. The services include meal preparation, routine household care, and assistance with daily living activities such as bathing, dressing, and personal hygiene.

On August 11, 2011, the Respondent became affiliated with Hope Network, a nonprofit corporation that also serves individuals with disabilities and the elderly. The Hope Network offices are located in Grand Rapids, Michigan, and provide rehabilitative and behavioral health services through approximately 47 affiliated organizations located throughout Michigan.

The 8(a)(5) and (1) Allegations

Facts

The 2009–2011 Collective-Bargaining Agreement

The Respondent and the Union entered into a collective-bargaining agreement that was effective by its terms from December 2, 2009, to December 2, 2011. (GC Exh. 5.) The negotiations for this agreement began on June 29, 2007. Attorney James Gwinn was the lead negotiator on behalf of the Respondent while Daniel Renner, a labor relations specialist with the Union, was the Union's chief negotiator. At the outset of negotiations, the parties signed written ground rules that had been proposed by the Respondent. Paragraph 1 of these ground rules indicated: "The chief negotiator for both parties will be vested with the authority to reach a tentative agreement at the bargaining table without approval from a superior person or governing body." Paragraph 6 of these ground rules indicated: "The parties recognize that the final agreement is subject to ratification by the parties."

The 2007–2009 collective-bargaining agreement was ratified by the union membership on December 11, 2009. On the same date the tentative collective-bargaining agreement was submitted to the Respondent's board of directors for ratification. At the board of directors' meeting, Gwinn pointed out to the board a potential disagreement between the parties regarding the language in the tentative agreement regarding holiday pay. Gwinn recommended that the Respondent's bargaining team meet with the Union to clarify the language prior to the board of director's ratification of the tentative agreement. After directing Gwinn as to the language it believed would clarify the matter, the board moved to ratify the collective-bargaining agreement contingent upon clarification of the holiday pay issue. (R. Exh. 21.) Thereafter, the Respondent's bargaining team met with the Union and a memorandum of understanding (MOU) clarifying the holiday pay issue was executed by the parties on January 15, 2010. (R. Exh. 2.) Another MOU clarifying the recognition clause of the contract was executed on the same date.

The parties' 2009–2011 collective-bargaining agreement contained a union-security clause and a dues-checkoff provision. This agreement also included an annual reopener clause regarding health insurance. During the term of the agreement, the parties' representatives met pursuant to this clause and any changes to health insurance agreed to by the parties' representatives were not submitted to the Respondent's board of directors for ratification.

The Negotiations for a Successor Agreement

On November 8, 2011, the parties met to begin negotiations for a successor agreement. Gwinn was again the Respondent's chief negotiator. The other members of the Respondent's bargaining team were Jamie Bragg-Lovejoy, the Respondent's then director of operations,[3] and Angel Pierce. The Union's chief negotiator was Renner and the other members of the Union's bargaining team consisted of three bargaining unit employees.

Prior to the commencement of the negotiations, the Respondent submitted to the Union the same set of ground rules that had been used in the prior negotiations. (GC Exh. 6.) Renner testified that at the first bargaining meeting he informed the Respondent's representatives that he would not sign the ground rules document agreement because it was not a mandatory subject of bargaining. Renner further testified that he indicated to the Respondent's negotiating team that the union membership would have to ratify any tentative agreement.

Gwinn also testified that Renner refused to sign the proposed ground rules. Gwinn recalled that Renner indicated that he objected to paragraph 4 of the proposed ground rules which indicated, in relevant part: "The parties agree not to make any statements to the media that would be adverse or damaging to the employer's business regarding the particular issues being

[3] Bragg-Lovejoy became the Respondent's executive director in approximately February 2012. Priscilla Horde, the Respondent's talent manager, who oversees human resources, replaced Bragg-Lovejoy on the negotiating team on December 11, 2011.

addressed in negotiations." Gwinn testified that Renner stated that he wanted "the ability to go to the media and take his case outside of the bargaining table."

Gwinn testified that at either the first or second bargaining session he stated that the Respondent's bargaining team "had authority to sign tentative agreements and to carry on as before, get-come to an agreement, come to a contract and take it to our board." (Tr. 334.) Bragg-Lovejoy testified that at the first meeting Gwinn stated that the Respondent's representatives could enter into tentative agreements but that those agreements would have to be submitted to the board of directors for ratification (Tr. 281). Bragg Lovejoy's testimony is corroborated by her contemporaneous notes of the first bargaining session. In this connection, her notes reflect: "TAs once signed; ratification." (R. Exh. 23, p.3.) Renner specifically denied that Gwinn ever stated during negotiations that the Respondent's board of directors had to ratify the agreement.

It is undisputed that at the first meeting, Renner refused to sign the proposed ground rules. I credit Renner's uncontradicted testimony that he indicated to the Respondent's representatives that any tentative agreement would have to be submitted to the union membership for ratification. I additionally note such a statement would also be consistent with the Union's position regarding the first set of negotiations between the parties.

With respect to the conflict in the testimony between Renner, Gwinn, and Bragg-Lovejoy about what Gwinn said regarding his authority to enter into an agreement, I credit the testimony of Gwinn and Bragg-Lovejoy. Their testimony is mutually corroborative and is inherently plausible. In this regard, in 2007 the parties executed ground rules proposed by the Respondent for the negotiations for their initial contract. In fact, both parties ratified the tentative agreement reached by their negotiating teams. In the Union's case, the union membership ratified the agreement while the Respondent's board of directors also ratified the agreement. In 2011, Gwinn proposed the same ground rules for the parties to abide by. With this background, I do not find Renner's testimony that Gwinn stated that he had the authority to enter into a final agreement to be plausible and I do not credit that aspect of Renner's testimony. In addition, I found the demeanor of Gwinn and Bragg-Lovejoy when testifying about this issue reflected certainty. On this point, Renner appeared to testify in a manner he believed would strengthen the Union's position. In addition, on cross-examination Renner testified in an evasive manner regarding this issue. Accordingly, I find that at the first meeting on November 8, 2011, Gwinn advised Renner and the other members of the Union's negotiating team that the Respondent's bargaining team had the authority to enter into a tentative agreement that would have to be ratified by the Respondent's board of directors.

In December 2011, the parties entered into an agreement which extended the existing collective-bargaining agreement in its entirety until a successor agreement became effective (Jt. Exh. 3). The parties continued to bargain throughout 2012 without reaching an agreement.[4] In December 2012, the Governor of Michigan signed into law a bill passed by the Michigan Legislature prohibiting employers and unions from entering into an agreement that required employees to pay union dues as a condition of employment. (Jt Exh. 1.) This law is commonly referred to as the Michigan "Freedom to Work Act." The statute provided that the prohibition against union-security clauses would apply only to an agreement "that takes effect on or is extended or renewed" after the statute's effective date of March 28, 2013.

In December 2012, the SEIU assigned organizing coordinator Sasha Eisner to assist Local 517 M in its negotiations with the Respondent because of the implications arising from the new "Freedom to Work" law. The initial meeting that Eisner attended was held on January 24, 2013. Renner was also present for the Union, while Gwinn and Horde were present for the Respondent. During this meeting the parties reached agreement on some additional issues, but an overall tentative agreement was not reached. The parties scheduled a meeting for February 27, but the Respondent canceled the day before the meeting because snow was forecast.

The parties met again on March 14, 2013. It is undisputed that at this meeting Eisner asked the Respondent's representatives if they were intentionally dragging their feet to get past the Michigan "Freedom to Work" deadline or if they were really interested in reaching an agreement. It is also undisputed that Gwinn responded that the Respondent was completely neutral on the right to work legislation; that it was a faith-based organization, and that the Respondent's representatives were there to try to reach an agreement. Eisner then stated that the parties "should get to work and try to reach an agreement." After further negotiations, the parties reached a complete tentative agreement that included a union-security clause. According to Eisner's uncontroverted testimony, the Union made some major compromises in order to retain the union-security clause. The tentative agreement contained a handwritten page signed by both Renner and Horde which contained the terms "1 yr upon ratification 5< 100 and 5 > 110." (GC Exh. 7.) According to Gwinn's undisputed testimony, the parties agreed that during the first year of the contract unit employees with less than 5 years would receive a $100 bonus and those with greater than 5 years would receive $110. Gwinn further testified that in order to establish a date for payment the parties agreed upon ratification of the agreement as the starting point. According to Gwinn, prior to the tentative agreement being signed, the parties discussed that ratification was necessary for both the Union and the Respondent. (Tr. 345.) After the terms of an agreement were reached, the parties shook hands and Renner and Horde signed the tentative agreement.

It is undisputed that the parties agreed to have a conference call the next day to make sure that there was agreement on language so that the tentative agreement could be presented to the Union members for ratification by March 25.

[4] From of the first meeting in November 2012 through March 2013 the parties met approximately 12 times.

Renner and Eisner testified that after the parties shook hands, Gwinn said that he had to get back to his office but that it was a "done deal" pending ratification of the contract by the union members. Renner and Eisner also testified that Gwinn did not say anything about needing to obtain ratification of the agreement by the Respondent's board of directors.

Gwinn's testimony conflicts with that of Eisner and Renner regarding a discussion of the Respondent's need to have the tentative agreement ratified. Gwinn testified that Eisner asked him to commit to bringing the tentative agreement to the board of directors for ratification before March 28. Gwinn testified that he responded it was not an issue and that if a tentative agreement was signed that day there would be 9 or 10 days to have a board meeting and that the Respondent's representatives would make sure that it happened. According to Gwinn, when the parties signed the tentative agreement Renner asked if Gwinn would let him know as soon as possible when the board of directors would meet to ratify the agreement. Gwinn assured him that he would and then left the meeting. Although Horde testified at the trial, she was not asked any questions by the Respondent's counsel regarding the substance of the meeting held on March 14.

There is also conflicting testimony regarding the telephone conversations that occurred between Renner, Gwinn, and Horde on March 15 and 16. According to Renner, on March 15 when he spoke to Gwinn and Horde they discussed the language of the earned time off provision in the tentative agreement. Renner emphasized that the Union needed to mail the members the language of the tentative agreement so that they could review and vote on it by March 25. While Renner testified that the Respondent's representatives made no mention of the board of directors needing to approve the tentative agreement during the conference call, Renner also testified that Gwinn indicated, "Once you notify us, it's contingently approved on your membership ratifying it." (Tr. 52.) Renner testified that the conference call between the same individuals on March 16 resolved the language regarding paid time off.

Gwinn testified that in the conference call on March 15, in addition to discussing language issues in the tentative agreement, Renner asked if a date had been established for the board of directors' meeting. Gwinn responded that the Respondent's representative had relayed the message to the board of directors about having a meeting regarding the contract, but they had not yet been given a response. Gwinn testified that in the telephone call held on March 16, Renner asked again if there was a date set for ratification by the board of directors. Gwinn responded again that the date had not been established but that it would be.

Horde testified that during the timeframe between when the tentative agreement was reached on March 14 and 25, Renner asked her either via an email or in a telephone call whether the board of directors had to ratify the tentative agreement.

On March 18, Eisner sent an email to Renner (GC Exh. 22) which states, in relevant part:

> Did you find out from Priscilla if there are any further steps on their end that need to happen to make the TA official before 3/26? (E.g. does board president Daniel Devos have to approve?)[5]

On March 18 at 2:18 p.m., Renner responded with an email to Eisner (GC Exh. 22) indicating:

> yes i did . . . they agreed to have a conditional approval of course pending membership but set up for 3-26-13.

On the same date at 2:41 p.m. Renner sent another email to Eisner indicating:

> employer/board approval they have as they have a type of board, they have a conditional approval already put together contingent upon official notification from us that the members approved. . .

On March 21, Gwinn sent the following letter (R. Exh. 9) to Renner by both mail and fax:

> In our most recent bargaining session on March 14, 2013 and in our follow-up telephone conversation on March 15, 2013 you expressed concern as to the timeliness of the employer's vote on the proposed collective bargaining agreement.
>
> The Board of Directors for Alternative Community Living, Inc. has scheduled this meeting to vote on the collective-bargaining agreement for the afternoon of March 25, 2013. We will notify you of the results upon our receipt of same. If you have any questions, please call.

Renner did not directly respond to or dispute any of the statements contained in Gwinn's March 21 letter.

On March 25, the union membership ratified the tentative agreement and Renner notified Gwinn and Horde of that fact by an email at 3:53 p.m. (R. Exh. 10.) At 4:47 p.m. Renner sent another email to Gwinn and Horde (R. Exh. 13) indicating, in relevant part:

> Need to work on the new documents for distribution. I will put together the changes and send to you both in the coming days. I hope we do not have issue with signing that final document for 3-25-13 as that is when both the members and the board approve (hopefully board approval), please let me know when this has been approved by the board as again the members have ratified.

With respect to the conflicting testimony between Gwinn, Eisner and Renner regarding what, if any, statements were made by the parties about the necessity of ratification of a tentative agreement by the Respondent's board of directors, I find that none of the witness accounts are uniformly reliable. I find that both Renner and Eisner testified regarding the March 14 meeting in a manner that they believed would bolster the Union's position. In addition, I find their testimony that Gwinn did not say anything about needing to obtain ratification of the agreement by the Respondent's board of directors at this meeting to be implausible and contradicted by objective evidence.

I credit Gwinn's testimony that when the parties signed the

[5] The record establishes that Daniel Devos is the president of the Hope Network board of directors.

tentative agreement on March 14, Renner asked Gwinn if he would let him know as soon as possible when the Respondent's board of directors would meet to ratify the agreement. I also credit Gwinn's testimony that in telephone calls on March 15 and that the 16 Renner asked Gwinn if a date had been set by the board of directors to ratify the agreement. I credit this testimony because it is inherently plausible under the circumstances. As noted above, I find that at the first bargaining session in November 2011 Gwinn advised Renner that he had the authority to enter into an agreement that would have to be ratified by the Respondent's board of directors. Thus, from the outset of negotiations, Renner knew that there would be some form of ratification by the Respondent's board of directors. I find that Renner would want to know the date when the Respondent's board of directors would meet regarding the tentative agreement, given the looming deadline of Michigan's right to work legislation on March 28. While Renner's articulation of this issue is somewhat garbled, I also note that Renner's testimony acknowledged that Gwinn told him in one of the conference calls that the agreement was "contingently approved" after the Union's notification that the membership had ratified the agreement. (Tr. 52.) Certainly, the reference to the fact that the agreement would only be contingently approved based on the Union's ratification suggests that Renner knew that the Respondent's board of directors would have to approve the tentative agreement before it became final. Renner's emails to Eisner on March 18, while again not models of clarity, acknowledge that the Respondent's board of directors would be meeting on the contract and would have to approve it. Gwinn's March 21 letter explicitly makes reference to the concern that Renner had expressed at both the March 14 bargaining meeting and the March 15 phone conversation regarding when the employer would ratify the contract. As noted above, Renner did not contemporaneously challenge this assertion. Finally, the email that Renner sent to Horde and Gwinn on March 25 explicitly acknowledges that the board of directors had to approve the contract.

While I have credited Gwinn's testimony when it conflicts with Renner's, I find that Gwinn's testimony regarding what Eisner said about encouraging Gwinn to bring the tentative agreement to the board of directors for ratification before March 28 is not reliable. I note that Gwinn admitted having difficulty in recalling the exact language assertedly used by Eisner regarding this issue. (Tr. 341–342.) I also note that Eisner's email of March 18 to Renner reflecting uncertainty regarding whether the Respondent's board of directors had a role in approving the tentative agreement establishes that he did not have detailed knowledge regarding the Respondent's ratification procedure at the March 14 meeting. I find it doubtful that Eisner would be asking specific questions about whether the Respondent's board of directors would ratify the agreement on March 14, yet send an email to Renner on March 18 inquiring about that very process.

I find that Horde's testimony that Renner called her some time after March 14 and inquired whether the Respondent's board of directors had to approve the agreement does not detract from my finding that Renner had knowledge of this requirement. Horde's testimony was generalized and I find it not as credible as Gwinn's detailed testimony on this issue that is corroborated by his letter of March 21 to Renner. I find that Gwinn's testimony is the most reliable account of the discussions that occurred on March 14, 15, and 16 about the Respondent's need to have the tentative agreement ratified by its board of directors.

The March 25 Board of Directors' Meeting

At the meeting held on March 25, 2013, from 3:30 to 4:15 p.m., the Respondent's board of directors voted to not approve the tentative collective-bargaining agreement. The official minutes of this meeting (GC Exh. 16) and the uncontradicted testimony of board member Richard Fabbrini establishes that while the board had overall satisfaction with the terms and conditions set forth in the proposed agreement, board members had serious reservations about the union-security clause contained in the agreement and its impact in relation to the approaching effective date of Michigan's "Freedom to Work Act."

The minutes indicate:

> The Board discussed the recent and sudden escalation of threats of severe sanctions against organizations where ratification of proposed collective bargaining agreements occurred on the eve of the effective date of the Freedom to Work Act. The Board raised concerns about being subjected to harsh attacks similar to those recently lodged against various Michigan institutions that entered into agreements before the effective date of the Freedom to Work Act. Board members discussed their unwillingness to ratify the proposed collective bargaining agreement where board action could be perceived as an intentional effort to circumvent the intent of the Legislature and Michigan public policy. The Board discussed its inability to increase its rates to mitigate the damage to which the Company would be subjected in the event it was targeted for similar attacks. The Board discussed how its programs affecting vulnerable people could be negatively affected if it took action that could expose the Company to financial penalties and/or retributive action

At the meeting, members of the board discussed recent media reports about the threats of sanctions against public institutions by Michigan legislators that had entered into a collective-bargaining agreement before the effective date of the "Freedom to Work Act" that contained a union-security clause. Media reports that the board members considered (R. Exh. 19) reflected that several Michigan public institutions had entered into agreements which contained union-security clauses prior to the effective date of the law and that some Michigan legislators had proposed legislation in response to that action. For example, an article dated March 21 in the Huffpost Detroit reported that Wayne State University had ratified an 8-year collective-bargaining agreement and that the University of Michigan had reached tentative 5-year agreements with five of its unions. The article indicated that in response to these actions a budget panel of the Michigan House of Representatives approved a proposal that would reduce State funding unless the institutions could prove that the contracts would significantly reduce costs. Under this proposal, higher education institutions could lose as

much as 15 percent of their expected State funding (R. Exh. 19, p. 13.)

According to Fabbrini's testimony, the board members were concerned about the possible loss of 15 percent of its State funding since 75 percent of the Respondent's funds were received from the State of Michigan's community mental health boards. (Tr. 240.) Fabbrini testified such a loss of funding would have a substantial impact on the Respondent's operations. Based on that concern, the board of directors passed a resolution rejecting the tentative collective-bargaining agreement and directing the Respondent's bargaining team to return to collective bargaining with instructions to "present a counter proposal to the Union incorporating all the terms of the proposed agreement except to revise those sections of the agreement that would be in conflict with Michigan's Freedom to Work Act."

The Post-March 25 bargaining

On March 26 at 3:58 p.m. Gwinn sent the following email to Renner[6]:

> We have been informed that on March 25, 2013, the Board of Directors of Alternative Community Living, Inc. voted not to ratify the proposed collective bargaining agreement.
> We have additional work to do with the bargaining table.
> Please contact me with available dates for continue contract negotiations so we can coordinate our schedules.

Renner testified that he contacted Gwinn by phone shortly after he received Gwinn's email. Renner testified that he asked Gwinn what had happened, as Gwinn had always indicated that he had the authority to approve the contract on behalf of the Respondent. According to Renner, Gwinn indicated that he was directed to send the email and that is all he could tell Renner. Gwinn did not testify regarding such a conversation. While I credit Renner's uncontradicted testimony that he had a brief phone conversation with Gwinn on the afternoon of March 26 and asked what happened, I find no significance to the portion of Renner's testimony reflecting that Gwinn had always indicated that he had the authority to approve the contract on behalf of the Respondent. As I have indicated above, the record as a whole does not support that claim.

Shortly thereafter, Renner sent an email to Gwinn indicating that the Union was available to meet the next day to continue contract talks. Later on March 26, Renner sent another email to Gwinn indicating that it was the Union's position that there was, in fact, a collective-bargaining agreement and that unless the Respondent indicated on March 27 that it would execute the agreement the Union would file an unfair labor practice charge with the NLRB (GC Exh. 11). On March 27 at 5:21 p.m., after hearing no response from the Respondent, the Union's attorney, Amy Bachelder, sent an email to Gwinn asking what the Respondent's objection to the agreement was and indicating that "without prejudice to its legal position, the union was available to meet on March 28 to resolve the matter." (GC Exh. 12.)

On March 28, Bachelder and Gwinn spoke by phone. Bachelder did not testify at the hearing and Gwinn did not testify regarding this telephone conversation. However, according to a confirming email that Bachelder sent to Gwinn on that date, during their phone conversation Bachelder asked Gwinn what the problem was with the contract. Gwinn responded that that the board of directors had voted on March 25 not to approve the contract. When Bachelder asked Gwinn what the board's problem with the contract was, Gwinn replied that he had not been informed of the reasoning behind the decision. When Bachelder asked when he would know, Gwinn said that he would soon receive the board's reasoning. Bachelder asked if the implementation of Michigan's right to work law was an issue in the Respondent's actions. Gwinn replied that he could not have a meaningful conversation until he had received instructions from his client. When Gwinn stated that the Union had not provided dates for negotiation, Bachelder indicated that the Union had informed him that it was available on March 27 and 28. Gwinn stated that he was not available on those dates. Bachelder reiterated that the Union was prepared to execute a contract consistent with the March 14, 2013 agreement and that any further negotiations by the Union were without prejudice to its position that there was binding agreement between the parties. (GC Exh. 13.)

On April 3, Renner sent a letter to the Respondent that reiterated the Union's position that the parties had a collective-bargaining agreement which had been ratified by the union membership. The letter also requested information regarding the action of the board of directors with regard to the parties' tentative agreement. The letter indicated that when the Union reviewed this information it would decide on its course of action. (GC Exh. 15). On April 4, 2013, Gwinn responded in a letter stating that the proposed March 14, 2013 agreement was subject to ratification by the Respondent's board of directors, which had not occurred and that there was no final collective bargaining agreement. The letter also enclosed the board of directors' minutes for the March 25 meeting and asked the Union to provide bargaining dates for continued negotiations. (GC Exh. 16.) On April 5, Renner responded in a letter offering bargaining dates and reiterating that the Union was not waiving any rights with respect to its position that the parties had a final collective-bargaining agreement.

On April 12, Renner sent a letter to the Respondent confirming a meeting on April 17, 2013. The letter reiterated the Union's position that it had a contract with the Respondent. The letter indicated that any proposals that were agreed to in further bargaining would be contingent upon the unfair labor practice charges that were under investigation by the NLRB. The letter further indicated that "Proposals made by the Union and tentative agreements are null and void in the event that the NLRB issues an unfair labor practice complaint consistent with the Union's contention that the parties have a binding agreement." (GC Exh. 17.)

At meeting held on April 17, Eisner and Renner were the principal representatives of the Union, while Gwinn and Horde represented the Respondent. At the meeting, Eisner reaffirmed

[6] Gwinn was in court on March 26. When he returned to his office in the afternoon he learned of the Respondent's decision not to ratify the tentative agreement but testified credibly that he was not aware of the reasons at that point.

the Union's position that the parties had a binding contract based on the agreement that had been reached on March 14. Eisner indicated that the Union would not prejudice that position, and if it engaged in discussions with the Respondent, it would do so on a "contingency" basis. Eisner stated that the Respondent was a private employer, unlike the public institutions that had been mentioned in the media reports considered by the board of directors, and which had caused the board to be concerned about a possible loss of funding. Eisner also stated that since the "Freedom to Work" law's effective date had passed, the threat from the legislature was gone. Eisner proposed that the Respondent accept the terms of the March 14 agreement and the Union would withdraw its unfair labor practice charge.

Gwinn responded that the Respondent was maintaining its position and presented the Union with the Respondent's final offer. According to Renner's uncontradicted testimony, Gwinn also gave the Union a written statement which outlined the content of its final offer. (GC Exh. 18; Tr. 68.) In addition, Gwinn read the statement to the Union at the meeting. In the a written statement that accompanied its last offer, the Respondent indicated that the proposal revised the dues provision and that the term of the agreement was described as being for 44 months in order to obtain the same length of time as the tentative agreement had provided for.[7] The Respondent's statement also indicated that the parties were at an impasse and that the Respondent was submitting its "last, best, and final offer." The Respondent's statement also asked the Union to present its final offer to the union membership for ratification. The statement further indicated, "If we do not hear from you to discuss this last, best, and final offer, or if you do not inform us of the results of the ratification vote of the membership, then the employer will implement its last best and final offer effective at the close of the pay period on May 4, 2013 or May 5, 2013." The statement also indicated that the date of implementation would terminate the contract extension agreement that was in effect.

The Respondent's final offer eliminated the union-security provision. The offer contained an article entitled "Dues and Service Fee" which made the deduction of union dues voluntary. The Respondent also attached a dues-checkoff authorization form consistent with its proposal.

After the Respondent made its final offer, the Union raised issues that it had previously abandoned or had compromised in an effort to reach agreement before the "Freedom to Work" law came effective. In this connection, the Union raised issues including an increase in wages, earned time off provisions for part-time employees, an arbitration clause, and paid holidays. The Respondent summarily rejected all of the Union's proposals.

On April 19, Gwinn sent a letter to Renner reiterating his request that the Union present a final offer to the membership for ratification. The letter also reiterated that the Respondent intended to implement its final offer on May 5, 2013. (R. Exh. 17.) On April 30, Renner sent a letter to the Respondent indicating that the Union was reviewing the Respondent's April 17 proposal and that it was ". . . preparing counterproposals which are responsive to the changed circumstances reflected by the Employer's final offer and the amended Labor Mediation Act legislation which was effective on March 28, 2013. The parties are not at an impasse and have a scheduled negotiation meeting for May 10, 2013 at which the union will present proposals. Accordingly, unilateral imposition of the employer's final offer is premature." (GC Exh. 20.)

On May 5, the Respondent implemented its final offer. According to Horde's uncontroverted testimony, after the implementation of the Respondent's final offer, it continued to honor the dues-checkoff authorizations executed by employees and has continued to remit dues to the Union. The Respondent has also continued the existing practice of notifying the Union when new employees are hired and honoring dues-checkoff authorizations that are submitted by newly hired employees. From May 3, 2013, to May 14, 2014, only two employees have notified the Respondent that they did not wish to pay union dues since the Michigan right to work law became effective. The Respondent also paid employees the ratification bonus set forth in the tentative agreement.

On May 10, the parties had one final meeting and reiterated the positions they had expressed at the April 17 meeting.

Analysis and Conclusions

Whether the Respondent Violated Section 8(a)(5) and (1) by Failing to Ratify and Execute the Tentative Collective-Bargaining Agreement

The General Counsel first contends that the Respondent did not give the Union clear and timely notice of the limitation on its negotiator's authority to enter into a final agreement. The General Counsel correctly notes that the Board has held that in the absence of "affirmative, clear and timely" notice of the limitation on a bargaining representative's authority, "an agent appointed to negotiate a collective bargaining contract is deemed to have apparent authority to bind his principal." *University of Bridgeport*, 229 NLRB 1074, 1082 (1977); *Aptos Seascape Corp*., 194 NLRB 540, 544 (1971). The Board has also held that any limitation placed on the negotiating authority of a bargaining representative must be disclosed to the other party before an agreement is reached. *Teamsters Local 771 (Ready-Mixed Concrete)*, 357 NLRB No. 173 slip op. at 4 (2011).

The Respondent contends that the credible evidence establishes that the Union had clear and timely notice that the tentative agreement would be subject to ratification by the Respondent's board of directors.

It is undisputed that prior to the first meeting held by the parties on November 8, 2011, the Respondent submitted to the Union the same ground rules that the parties had agreed to in their prior negotiations. These ground rules provide that the chief negotiator has the authority to enter into a tentative agreement but that "final agreement is subject to ratification by the parties." While the Union refused to agree to these ground rules in the negotiations that began in November 2011, I find

[7] In effect, this extended the length of the contract agreed to by the parties in the March 14 tentative agreement by 1 month.

that this document reflects the intent of the Respondent to set forth the limitation imposed on its chief negotiator. I find that the credible evidence establishes that at the initial bargaining meeting the Respondent's chief negotiator, Gwinn, advised the Union that he had authority to enter into a tentative collective-bargaining agreement that would have to be ratified by the Respondent's board of directors.

I also find that prior to the tentative agreement being signed by the parties on March 14, the parties again discussed the fact it would have to be ratified by both parties. After the tentative agreement was signed, Renner asked Gwinn if he would let him know as soon as possible when the Respondent's board of directors would be meeting to ratify the agreement.

Based on the credible evidence, I find that Gwinn gave the Union clear and timely notice of the limitations on his authority to negotiate a collective-bargaining agreement. Gwinn made it clear to the Union at the outset of negotiations that any tentative agreement would have to be ratified by the Respondent's board of directors. He reiterated that point prior to the parties' execution of the tentative agreement on March 14, 2013. Accordingly, I find no merit in the General Counsel's argument that the Respondent failed to give clear and timely notice of the limitation on the authority of its bargaining representative prior to the parties reaching a tentative agreement on March 14, 2013.

The General Counsel also contends, however, that even if the Respondent had properly notified the Union that its board of directors needed to ratify the tentative collective-bargaining agreement, the Respondent violated Section 8(a)(5) and (1) because it withheld ratification without good cause.

The Respondent contends that the board of directors had a good-faith basis to refuse to ratify the tentative agreement because of concerns that the ratification of the agreement could jeopardize the Respondent's funding.

In support of his position, the General Counsel relies on cases such as *Valley Central Emergency Veterinary Hospital*, 349 NLRB 1126 (2007); and *Transit Service Corp.,* 312 NLRB 477 (1993), where employers withdrew or repudiated tentative agreements without good cause in violation of Section 8(a)(5) and (1).

In the instant case, the evidence is clear that the basis of the Respondent's board of directors' refusal to ratify the tentative agreement on March 25 was its concern regarding the impact of the imminent implementation of the Michigan "Freedom to Work" Act on the Respondent's funding.

As noted above, at the meeting the board of directors considered reports appearing in the media reflecting the possible impact on educational institutions that signed a collective- bargaining agreement with a union-security clause shortly before the implementation of the "Freedom to Work" legislation. One such report indicated that a budget panel of the Michigan House of Representatives approved legislation that educational institutions which signed such an agreement could lose as much as 15 percent of their State funding, unless the institution could prove that the contract would significantly reduce costs. Another report indicated that when Michigan State University was approached by a union seeking an extension of a collective-bargaining agreement which included a union-security provision, the University refused to do so because of a possible loss of $15 million in funding because of the proposed legislation in the Michigan House of Representatives (R. Exh. 19, p.10).

Alarmed by the threats of a loss of funding against public institutions that had entered into collective-bargaining agreements containing a union-security clause shortly before the effective date of the new "Freedom to Work" law, the board voted to not ratify the tentative collective-bargaining agreement. The board further directed the Respondent's negotiators to enter into an agreement consistent with the provisions of the new law, i.e, one that did not contain a union-security clause.

In considering this issue, I note that while a withdrawal of a previously agreed to proposal is not necessarily violative of the Act, such a withdrawal is unlawful if the respondent does not demonstrate good cause for the withdrawal of the previously agreed to proposal. *Transit Service Corp*., 312 NLRB at 478. Under the unusual circumstances of the instant case, I find that the Respondent established it had sufficient cause to refuse to ratify the tentative agreement. At the time the board of directors made its decision, the effective date of the "Freedom to Work" was 3 days away. A media report had indicated that a budget panel of the Michigan House of Representatives had approved a 15-percent reduction of the State funding to educational institutions that had recently entered into a collective-bargaining agreement that contained a union-security clause, unless these institutions could demonstrate that the agreement included substantial cost savings.

The Respondent receives the great majority of its funding through the State of Michigan. While it was not clear on March 25 that the funding restriction passed by a budget panel of the Michigan House of Representatives would in fact, become law, I find that the board of directors was genuinely concerned with a possible substantial loss in the Respondent's funding if it ratified the tentative collective-bargaining agreement, which contained a union-security clause, shortly before the effective date of the new law. I find, therefore, that the decision of the board of directors was based on practical business considerations and not on a desire to delay or impede negotiations or because of any philosophical objection to a union-security clause.

In reaching this conclusion, I find persuasive the Board's decision in *Food Service Co*., 202 NLRB 790, 803 (1973), in which it found that the employer established sufficient cause to withdraw from two tentative agreements and that such conduct did not warrant an inference of bad-faith bargaining. In that case, the employer withdrew agreement on successor and subcontracting provisions. In doing so, the employer relied on the advice of newly retained counsel, who had explained at the bargaining table that the successor clause could hinder the employer's ability to sell the business and that the subcontracting provision could restrict the employer's existing practice of utilizing casual employees.

I find the cases relied on by the General Counsel to be distinguishable as in each of those cases, the respondent was unable to establish good cause for withdrawing from a tentative agreement. For example, in *Valley Central Emergency Veterinary Hospital*, supra, the employer's repudiation of the tentative agreement was based on its invalid objections to the union's ratification process, a subject within the exclusive control

of the union. In *Transit Service Corp,* supra, the Board adopted the administrative law judge's finding that the evidence established that the employer's withdrawal from a tentative agreement was motivated by the filing of a decertification petition and the desire to avoid reaching an agreement so that the decertification petition could be processed. Id. at 483.

On the basis of the foregoing, I find that the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to execute the tentative agreement reached on March 14 and accordingly I shall dismiss that portion of the complaint.

Whether the Respondent Refused to Bargain with the Union Regarding a Union Security Provision in Violation of Section 8(a)(5) and (1) of the Act

Paragraph 12 of the complaint alleges that the Respondent refused to bargain with the Union with regard to union-security in violation of Section 8(a)(5) and (1) of the Act. In support of this allegation, the General Counsel first contends that the Respondent's conduct in regard to bargaining about the union-security clause was " . . . motivated simply by bad faith opposition to union security." (GC Br. at 36.) In support of this contention, the General Counsel relies on *Chester County Hospital*, 320 NLRB 604, 622 (1995), enfd. 116 F. 3d 469 (3d Cir. 1997). There, the Board found that the employer's opposition to union-security and dues-checkoff was based on vague "philosophical" grounds without substantial business justification. Under those circumstances the Board found that the employer had a fixed intention not to agree to any form of union-security or checkoff and thereby violated Section 8(a)(5) and (1).

In the instant case, the parties' 2009–2011 agreement contained a union-security clause and the Respondent never raised any philosophical objections to the issue of union security during negotiations. On March 13, when Eisner asked if the Respondent was stalling negotiations in an attempt to get past the implementation of the impending right to work law in Michigan, Gwinn stated that the Respondent was "neutral" on the right to work legislation and was trying to reach an agreement with the Union.

The minutes of the board of directors' March 25 meeting and Fabbrini's testimony establish that the board's reservations regarding entering into a collective-bargaining agreement containing a union-security clause was based on the business-related consideration that the Respondent's funding may be cut if it entered into such an agreement on the eve of the implementation of the "Freedom to Work" legislation.

Under the circumstances present in this case, I do not find that the Respondent's refusal to ratify the tentative collective-bargaining agreement containing a union-security clause was based on any philosophical opposition reflecting a fixed intention not to agree to a union-security provision, but rather on the business related consideration of a potential loss of funding by the State of Michigan. Accordingly, I find *Chester County Hospital* to be distinguishable.

The General Counsel next argues that, regardless of the merits of its reasons for refusing to execute the March 14 tentative agreement, the Respondent delayed in communicating its reasons for refusing to ratify the agreement containing a union-security provision at a critical time in the negotiations. The General Counsel contends that the delay was sufficient to amount to a refusal to bargain in good faith in violation of Section 8(a)(5) and (1).

As noted above, the Respondent's board of directors refused to ratify the tentative agreement on the afternoon of March 25, 2013. The Respondent did not communicate this fact to the Union until March 26 at 3:58 p.m., when Gwinn sent an email to Renner notifying him of the board's decision. Gwinn's email also requested that the Union provide him with available dates for negotiations. Renner immediately called Gwinn and asked him what had happened. Gwinn replied that he was directed to send the email and that was all that he could tell Renner at that time. That same day, Renner sent Gwinn an email indicating that the Union was available to meet on March 27.

After the Union had received no response from the Respondent, on March 27 at 5:21 p.m. the Union's attorney, Bachelder, sent an email to Gwinn asking what the Respondent's objection to the agreement was and indicating that the Union was available to meet on March 28 to resolve the matter. After again hearing no response from the Respondent on March 28, Bachelder called Gwinn and asked why the board of directors had not ratified the agreement. Gwinn replied that he had not been informed of the reasoning. When Bachelder specifically asked if the implementation of the Michigan right to work law was an issue in the Respondent's actions, Gwinn replied that he could not have a meaningful conversation until he received instructions from his client. Bachelder stated that the Union had informed Gwinn that it was available to meet on March 27 and 28 but Gwinn replied only that he was not available on those dates, without giving a reason why.

On April 3, Renner sent a letter to the Respondent requesting information regarding the action taken by the board of directors with regard to the parties' tentative agreement. It was not until April 4, 2013, that the Respondent submitted the minutes of the board of directors meeting reflecting the reasons for the refusal to ratify the agreement.

I find that the Respondent's failure to convey to the Union the reasons relied on by the board of directors in refusing to ratify the tentative agreement for a 10-day period is incompatible with the obligation to bargain in good faith. While the Respondent had a plausible reason for failing to ratify the tentative agreement containing a union-security clause, it was incumbent on it to immediately convey those reasons to the Union so that an intelligent dialogue regarding the Respondent's reasons could ensue. This is especially so given the fact that implementation of the "Freedom to Work Act," that was the genesis of the Respondents concerns regarding the tentative agreement, was only days removed from the board of directors' meeting. The Respondent persisted in its failure to give the reasons for its refusal to ratify the tentative agreement for 10 days, despite being directly asked by the Union on several occasions as to the reasons for its action.

As the General Counsel correctly noted in his brief, the Board has emphasized that a party to collective bargaining must ". . . display a degree of diligence and promptness in arranging for the elimination of obstacles thereto comparable to that which he would display in his other business affairs of importance." *Barclay Caterers, Inc*., 308 NLRB 1025, 1035

(1992) (quoting *J. H. Rutter-Rex, Inc*., 86 NLRB 470, 506 (1949)). In this connection, in *NLRB v. Mayes Brothers, Inc*., 383 F.2d 242 (5th Cir. 1967), enfg. 153 NLRB 18 (1965) the court enforced the Board's order finding that the employer had refused to bargain in good faith in violation of Section 8(a)(5) and (1). In its decision, the court noted, "[the employer's] failure either to sign the agreement or to advise the [u]nion why it would not sign is inconsistent with any sincere intention to compose differences without unnecessary delay and therefore is not good faith bargaining." In the instant case, the inordinate delay that occurred regarding the reasons for the rejection of the tentative agreement also does not comport with the obligation to address differences without unnecessary delay.

I also agree with the General Counsel that the Respondent's refusal to convey its reasons for its rejection of the tentative agreement occurred at a particularly sensitive time and that this is also an important factor to consider in determining whether the Respondent complied with its obligation to bargain in good faith. In *Brooks, Inc*., 228 NLRB 1365 (1977), enfd. in relevant part, 593 F.2d 936 (10th Cir. 1979), the union sent a timely notice to reopen an existing contract on April 10, 1975. When the union received no response, a union agent attempted on several occasions in May 1975 to get in touch with the individual he believed would be the employer's principal negotiator. That individual indicated that someone else would handle negotiations. On June 7, the union learned the name of the individual who then referred the union agent to an attorney. A meeting between the parties was arranged for June 11. At that meeting the employer's attorney indicated that no bargaining would occur until the employer's obligation to bargain was established. On June 16 the existing contract expired and employees went on strike. On June 16, the employer indicated it was willing to bargain but imposed conditions on the negotiations. The Board found that the employer's conduct constituted a refusal to bargain in violation of Section 8(a)(5) and (1). In enforcing this part of the Board's order, the court noted that the employer's outright refusal to bargain lasted only 5 days but that ". . . [w]hile the time is short, the refusal came at a critical period just prior to the expiration of the contract in the face of the threatened strike." 593 F.2d at 939–940.

On the basis of the foregoing, I find that the Respondent's refusal to relate the basis for its decision to refuse to ratify the tentative contract from March 25 to April 4 constitutes a failure to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

Whether the Respondent Implemented Its Final Offer Without Reaching a Valid Impasse in Violation of Section 8(a)(5) and (1) of the Act

The complaint alleges that on May 5, 2013, the Respondent implemented its final offer dated April 17, 2013, without reaching a valid impasse in violation of Section 8(a)(5) and (1). In defense of this allegation, the Respondent contends that the parties were at an impasse and that it was privileged to implement the final offer. In support of its position, the Respondent claims that the Union refused to bargain because it referred to the meetings held after March 25 as "contingency talks" rather than collective-bargaining meetings.

In *Ead Motors Eastern Air Devices*, 346 NLRB 1060, 1063 (2006), the Board summarized the major factors in determining whether a valid impasse has occurred as follows:

> In *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), enfd.sub nom. *Television Artists, AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), the Board definedimpasse as a situation where "good-faith negotiations have exhausted the prospects of concluding an agreement." See also *Newcor Bay City Division*, 345 NLRB 1229, 1238 (2005). This principle was restated by the Board in *Hi-Way Billboards, Inc*., 206 NLRB 22, 23 (1973), enf. denied on other grounds 500 F.2d 181 (5th Cir. 1974), as follows:
>
> > A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is going to move from its respective position. [Footnote omitted.]
>
> The burden of demonstrating the existence of impasse rests on the party claiming impasse. *Serramonte Oldsmobile, Inc.,* 318 NLRB 80, 97 (1995), enfd. in pert. part 86 F.3d 227 (D.C. Cir. 1996). The question of whether a valid impasse exists is a "matter of judgment" and among the relevant factors are "[t]he bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broadcasting Co*., supra at 478.

In the instant case, in a letter dated April 5, after the Union had finally received the rationale of the Respondent's board of directors in refusing to ratify the tentative agreement, it offered dates to bargain with the Respondent but indicated that it did not waive its rights with respect to its position that the parties had a final collective-bargaining agreement. In a letter dated April 12, the Union reiterated its willingness to bargain but again indicated that any tentative agreements made were contingent upon the outcome of unfair labor practice charge under investigation. The Union explained any tentative agreements reached would be nullified if the NLRB issued a complaint consistent with the Union's contention that the parties had a binding agreement.

As set forth above in greater detail, at the April 17 meeting Eisner again indicated that the Union's position was that it had a binding agreement based but that the Union would bargain with the Respondent contingent upon the NLRB's decision regarding that issue. Eisner indicated that as a private employer the Respondent was different than the public institutions that had been mentioned in the media reports considered by the board of directors. Eisner proposed that the Respondent accept the terms of the March 14 tentative agreement and that the Union would withdraw its pending unfair labor practice charges.

In response, the Respondent presented a final offer to the Union that extended the date of the agreement by 1 month and eliminated the union-security provision but otherwise contained the terms set forth in the tentative agreement of March 14. The

Respondent requested that the Union submit the final offer to its membership for ratification. The Respondent further indicated that if the Union membership did not ratify this proposal it would be implemented on May 4 or 5, 2013.

The Union then made proposals on issues that it had previously abandoned or had compromised on in an effort to reach the terms of the tentative agreement that the parties entered into on March 14. Specifically, the Union sought to increase in wages, earned time off provisions for part-time employees, paid holidays, and an arbitration clause. The Respondent summarily rejected all of the Union's proposals.

On April 19, the Respondent sent a letter to the Union reiterating its request that the Union present the final offer to the membership for ratification and reiterating that the Respondent intended to implement that offer on May 5, 2013. On April 30, the Union sent a letter to the Respondent indicating it was preparing counterproposals which were responsive to the changed circumstances reflected by the Respondent's final offer and the right to work legislation which became effective on March 28, 2013. The letter claimed parties were not at an impasse and indicated that the Union would present a new proposal at the meeting scheduled for May 10. The letter further indicated that any unilateral imposition of the employer's final offer would be premature.

On May 5, the Respondent implemented its final offer.

In applying the principles set forth above to the facts of this case, I find that the Respondent has not met its burden of establishing that a valid impasse existed before it implemented its final offer. Accordingly, I find that by implementing that offer on May 5, 2013, the Respondent violated Section 8(a)(5) and (1).

On April 17, 2013, at the first meeting after the Respondent's board of directors refused to ratify the tentative agreement, the Respondent made a final offer that did not include a union-security provision and extended the date of the agreement by one month. The Respondent had prepared a written statement in advance of the meeting that was given to the Union and read by Gwinn at the meeting. At the April 17 meeting, the Respondent informed the Union that if it did not agree to its final offer by May 5, 2013, the Respondent would unilaterally implement it. Clearly, this is not a situation where good-faith negotiations have exhausted the prospects of concluding an agreement. The Respondent entered into this phase of the negotiations with a fixed intention to achieve an agreement on its own terms.

In applying the factors set forth in *Taft Broadcasting*, supra, as noted above, I found that the Respondent violated its duty to bargain in good faith by delaying notification of the reasons for its board of directors' refusal to ratify the tentative agreement at a critical time in the negotiations. This delay negatively impacted the negotiations that took place after the Respondent's refusal to ratify the tentative agreement. Until the Union knew the reasons for the Respondent's refusal to ratify the tentative agreement, it was unable to address the Respondent's concerns.

With respect to the length of the negotiations, while the parties had been bargaining since November 2011, the board of directors' action in refusing to ratify the tentative agreement because it contained a union-security provision substantially changed the nature of the negotiations. While the Respondent found satisfactory the terms and conditions of employment set forth in the tentative agreement, it objected to the union-security clause for the reasons previously noted. As noted above, even before having the first meeting after this event, the Respondent had determined that an agreement between the parties would not include union security and would be extended for an additional month, but would include all of the other issues that the parties had agreed on prior to the board of directors' refusal to ratify the tentative agreement. After having one meeting, in which it refused to deviate from its predetermined course of action, the Respondent reiterated that it would implement its final offer on May 5. This conduct is clearly indicative of the fact that the Respondent did not make a good-faith effort to reach the terms of a mutually acceptable agreement before declaring an impasse.

The question of a union-security provision was a vital importance to both parties. As set forth above, the Union abandoned and compromised several of its positions in order to reach a tentative agreement including the union-security provision in time to have it executed prior to the implementation date of the Michigan "Freedom to Work" statute. Obviously, the issue was also of critical importance to the Respondent since its board of directors' refusal to ratify the tentative agreement was based solely on the fact that it contained a union-security provision and the concern that the Michigan Legislature would cause the Respondent to lose funding if they agreed to such a contract on the eve of the implementation of the new legislation. While the new Michigan statute may preclude the Respondent from entering into a collective-bargaining agreement with a union-security provision after March 28, 2013, the Respondent's unilateral removal of this important provision, coupled with its unwillingness to consider discussing other issues to substitute for the loss of that provision, is also not indicative of a serious effort to reach a mutually acceptable agreement.

With regard to the contemporaneous understanding of the parties as to the state of negotiations, the Union adamantly disagreed with the Respondent's position that the parties were in impasse. In the Union's view there were a substantial number of issues that could be discussed, given the Respondent's position that it would not agree to a contract including a union security clause because of the new Michigan legislation. I find that the Union's proposal to revisit issues it had compromised or abandoned in order to obtain an agreement with union security clause provision prior to the implementation of the statute on March 28, to be a reasonable one. The Respondent's refusal to consider discussing other subjects in exchange for the removal of a union security provision also does not reflect a good faith effort to achieve a mutual agreement.

Finally, I find no merit to the Respondent's contention that because the Union expressed the position that any tentative agreements reached in the bargaining that began on April 17 were contingent upon a decision by the NLRB regarding whether the parties reached a binding contract on March 14, 2013, the Union refused to bargain and therefore the parties were deadlocked. I find nothing inconsistent in the Union's position that the parties had in fact reached a final agreement but, because of the uncertainty surrounding that issue, it would

bargain in good faith with the Respondent, as long as it was understood that any tentative agreements reached would not serve as a basis for the Respondent to later claim the Union had waived its right to claim a binding agreement was reached on March 14. In its April 30 letter, the Union indicated it was preparing counterproposals that were responsive to the changed circumstances reflected by the Respondent's final offer and the implementation of the right to work legislation. This letter reflects a continued desire on behalf of the Union to continue to negotiate to reach the terms of a collective-bargaining agreement and implicitly acknowledging that such an agreement may not include a union-security provision.

On the basis of the foregoing, I find that the Respondent implemented its final offer on May 5, 2013, without reaching a valid impasse and therefore violated Section 8(a)(5) and (1) of the Act.

The Alleged Violations of Section 8(a)(1)

From at least September 2012, through on or about September 7, 2013, the Respondent maintained its personnel handbook, as revised on February 11, 2011 (GC Exh. 4) and a "Corporate Compliance and Integrity Plan" handbook, as revised on October 9, 2009 (GC Exh. 3). These documents will be collectively referred to as the rules. The rules were distributed to all employees in the bargaining unit and to all newly hired employees during the time period set forth above (GC Exh. 2). On or about September 7, 2013, the Respondent rescinded those rules and employees were notified of the implementation of new rules on the same date.

The complaint alleges that during the time period set forth above, the Respondent maintained certain rules that violate Section 8(a)(1) of the Act. The General Counsel contends that the challenged rules are facially overbroad and therefore unlawful. The Respondent contends that the disputed provisions are lawful.

In determining whether the maintenance of a work rule violates Section 8(a)(1) of the Act the Board determines whether it reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel* 326 NLRB 824 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999). In *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board indicated that if a rule explicitly restricts Section 7 rights, it is unlawful. The Board further noted that if it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647. In *Lutheran Heritage Village*, the Board further indicated: "In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading, it must refrain from reading particular phrases in isolation, and must not presume improper interference with employee rights." Id. at 646.

As noted above, the General Counsel claims in this case only that the following rules would, on their face, reasonably be construed by employees to prohibit Section 7 activity and violate Section 8(a)(1) on that basis.

> Rule 6.4-Violence-Free Work Place . . . New Passages defines workplace violence as any verbal, written, or physical activity that is intended to intimidate, threaten or harm any person . . . . Conduct, which can reasonably be construed as hostile and threatening, may result in disciplinary action and possible termination of employment.

The General Counsel argues that this rule may reasonably be construed by employees to limit robust union activity which may be viewed as "harmful and intimidating" by employees who do not share those views.

In support of his position, the General Counsel relies on *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 fn. 3 and 294–295 (1999). In *Flamingo Hilton*, the Board relied on *Lafayette Park Hotel*, supra, and found that the employer's maintenance of a rule which prohibited "[m]aking false, vicious, profane, or malicious statements regarding another employee, guest, patron or the Hotel itself" violated Section 8(a)(1). In finding the rule overly broad and unlawful, the administrative law judge, whose decision on this issue was adopted by the Board, noted that the rule was overbroad because it permitted false statements, in addition to vicious, profane, and malicious statements. In the judge's view prohibiting merely false statements, without further definition, could cause employees to refrain from engaging in protected activities. 330 NLRB at 294.

In the instant case, when the language of the rule is read in context, it is clear that the rule precludes conduct that is intended to intimidate or which could reasonably be construed as hostile and threatening. There is, of course, no reference in the rule to a prohibition regardin g false statements. Accordingly, I find the challenged rule in the instant case to be distinguishable from the rules found unlawful in *Flamingo Hilton* and *Lafayette Park Hotel,* supra. In applying the Board's mandate in *Lutheran Village* to give the rule a reasonable reading, and refrain from reading phrases in isolation or presuming improper interference with protected rights, I find that employees would reasonably view the language of this rule which is entitled "Violence-Free Work Place" to be specifically directed to limiting workplace violence and not construe it as restraining Section 7 rights. Accordingly, I shall dismiss this allegation of the complaint.

> Rule 16.2-Dress Code . . . . When considering what is appropriate for the occasion, please note that the following clothing articles are never appropriate to wear to work: cut-off shorts, midriffs, ball caps in doors (sic), shirts with commercial or political advertisements, and sweat pants. . . .

The General Counsel contends that the provision of the rule which specifically prohibits "shirts with commercial or political advertisements" is overly broad and unlawful as it would prohibit an employee from wearing a shirt with a union logo.

It is well established that employees have a right under Section 7 to wear union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945); *Bell-Atlantic-Pennsylvania, Inc*., 339 NLRB 1084, 1086 (2003). If an employer can establish special circumstances that justify the need to preclude the wearing of union insignia, the Board has found that an employer may prohibit the wearing of such insignia. *Nordstrom, Inc*., 264 NLRB 698 (1982); *Leiser Construction,*

LLC, 349 NLRB 413, 415 (2007).

In the instant case, the Respondent raised no specific defense to any of the challenged rules. Thus, there is no evidence that the Respondent has special circumstances that would privilege it to maintain a rule that employees could reasonably construe as prohibiting the wearing of union insignia. Accordingly, I find that the Respondent has violated Section 8(a)(1) by maintaining the dress code rule set forth above.

> Rule 16.3-Employee Honesty and Integrity. . . . Employee should not use work-time to conduct personal business.
> Rule 16.11-Solicitation: In the interest of efficiency and for the protection of our Employees, New Passages prohibits solicitation and distribution of materials or conducting personal business of any kind by any Employee during work time. Also, New Passages prohibits solicitation or distribution of materials on New Passages property by non-employees. Please direct solicitors and distributors to your supervisor.

In challenging these rules the General Counsel correctly notes that the personnel handbook states in Section 11, paragraph 3: "Break periods are considered working time." The General Counsel contends that since the personnel handbook specifically provides that break times are considered working time, when Section 11, paragraph 3 of the handbook is read together with Rules 16.3 and 16.11, the collective effect is that employees may not use breaktime to conduct personal business, which would clearly encompass Section 7 activity such as solicitation for the union and distribution of union materials.

In *Our Way, Inc*., 268 NLRB 394, 395 (1983), the Board held that rules prohibiting solicitation during working time are presumptively lawful because ". . . that term connotes periods when employees are performing actual job duties, periods which do not include the employee's own time such as lunch and break periods." The Board also noted, however, ". . . . a rule is presumptively invalid if it prohibits solicitation on the employee's own time. Id. at 394.

In the instant case, the Respondent's handbook defines working time as including break periods. This makes the rules noted above, when viewed collectively, a facially overbroad restriction on the Section 7 rights of employees to solicit for and distribute literature on behalf of a union or engage in other protected activity during lunch and break periods. Accordingly, I find the maintenance of the above-noted rules violated Section 8(a)(1) of the Act.

> Rule 16.7- Consumer Confidentiality: In the course of your employment, you may have access to information about New Passages business, other Employees, and persons served which is confidential in nature. In accepting your employment with New Passages you are required to maintain confidentiality. . .
>
> Information concerning New Passages business, other Employees, or persons served should not be discussed outside the work site. Information concerning other Employees or persons served should not be released in any form to any individual or agency without the approval of New Passages.
>
> Rule 16.9-Media Releases: Only authorized New Passages Employees may give information to the media. If a contact is made by the media directly to an unauthorized Employee, that Employee is to request the media's contact information and is to inform his or her direct supervisor at once of the media's information request. No member of the media should be allowed in the facility without authorized New Passages representatives present.
>
> Rule 16.13-Confidentiality of New Passages Information: Employees have access to a wide range of confidential information. "Confidential information" is information which is not generally known and which the Employee obtained solely as a result of his or her employment.
>
> During employment, Employees should only share and discuss confidential information with other Employees on a need to know basis. Employees should never discuss confidential information with anyone outside New Passages. Furthermore, Employees should not directly or indirectly copy or remove from New Passages any information unless the Employee has a business reason for doing so and has received his or her supervisor's permission before doing so.
>
> Standard 3.2-Proprietary Information (Corporate Compliance and Integrity Plan handbook)
>
> a New Passages' business methods, business strategies, financial information, mailing lists, payment and reimbursement information, information relating to negotiations with physicians, Board Members, Officers and all other Personnel, independent contractors, or third persons, intellectual property, including patents, trademarks, copyrights and software and all other information concerning the property, business and affairs of New Passages are valuable and proprietary information and will be kept confidential.
>
> b. Personnel will not disclose any proprietary information to any unauthorized person unless disclosure is permitted under confidentiality policies and procedures or required by law.
>
> c. New Passages Board Members; Officers, and all other Personnel will exercise care to ensure that proprietary information is carefully maintained and managed to preserve and protect its value.
>
> Standard 6.2 Confidentiality with Colleagues (Corporate Compliance and Integrity Plan handbook)
>
> New Passages' Personnel should respect confidential information shared by colleagues in the course of their professional relationships and transactions. New Passages' Personnel should ensure that such colleagues understand Personnel's obligation to respect confidentiality and any exceptions related to it.

The General Counsel contends that the confidentiality rules set forth are overly broad and violate Section 8(a)(1) because they can reasonably be construed to limit the ability of employees to discuss terms and conditions of employment with each other and third parties such as a union or the media.

With respect to the disclosure of confidential information, the rules set forth above instruct that information concerning

other employees should not be discussed outside the worksite and that information regarding other employees should not be released "to any individual or agency" without the approval of the Respondent.

I find that the rules set forth above are overly broad and could reasonably be viewed by employees as restricting their Section 7 rights. In so finding, I note that in *Cintas Corp*., 344 NLRB 943 (2005), enfd. 482 F.3d 463 (D.C. Cir. 2007), the Board found that a rule "protect[ing] the confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters" [8] could be reasonably construed by employees to restrict discussions of wages and other terms and conditions of employment with other employees and with the union. Accordingly, the Board found rule to be unlawful under principles set forth in *Lutheran Heritage Village.*

Rule 16.7 provides that employees should not release information about other employees to "any individual or agency" without the approval of the Respondent. Rule 16.9 provides that only authorized employees of the Respondent may give information to the media.

In *Trinity Protection Services*, 357 NLRB No. 117, slip op. at 2 (2011), the Board held:

> It has been well established, since the Supreme Court's decision in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978), that Section 7 protects employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." Consistent with *Eastex*, the Board has held that employee's concerted communications regarding matters affecting their employment with their employer's customers or with other third parties, such as governmental agencies, are protected by Section 7 and, with some exceptions not applicable here, cannot lawfully be banned.

In *Trinity Protection Services,* the Board found that the statement to employees prohibiting them from disclosing "any company knowledge to any client" under penalty of discipline would preclude communications that are protected under the Act and accordingly the Board found the employer's statement to be violative of Section 8(a)(1).

Since, in the instant case, the rule does not exempt protected communications with third parties such as union representatives or other governmental agencies regarding workplace matters, employees would reasonably construe the rule as prohibiting such communications making the rule unlawful under *Trinity Protection Services* and *Hyundai American Shipping Agency*, 357 NLRB No. 80 slip op. at 13 (2011). Accordingly, I find the above noted confidentiality rules to be overly broad and violative of Section 8(a)(1) of the Act.

> Rule 16.14-E-Mail, Voicemail, Intranet and the Internet . . Employees are cautioned against communicating about work and/or related topics on social networking sites as this type of communication may breech (sic) client confidentiality or may potentially lead to incidents of dignity and respect violations.
>
> Standard 5.12 Derogatory Language: (Corporate Compliance and Integrity Plan handbook) New Passages Personnel should not use derogatory language in a written or verbal communications to or about consumers. New Passages Personnel should use accurate and respectful language in all communications to and about consumers.
> Standard 6.1 Respect (Corporate Compliance and Integrity Plan handbook)
>
> a. New Passages' Personnel should treat colleagues with respect and represent accurately and fairly the qualifications, views, and obligations of colleagues.
>
> b. New Passages Personnel should avoid unwarranted negative criticism of colleagues with consumers or with other professionals. Unwarranted negative criticism may include demeaning comments that refer to colleagues' level of competence or to individuals' attributes such as race, ethnicity, national origin, color, age, religion, sex, sexual orientation, marital status, political belief, mental or physical disability or any other preference, personal characteristic or status.
>
> c. New Passages Personnel should cooperate with New Passages colleagues with colleagues of other professions when it serves the well-being of consumers.

The General Counsel claims that these rules limit Section 7 discussions about work- related topics and are therefore unlawful. Since Rule 16.14 cautions employees about communicating about work on social networks sites as this type of communication "may potentially lead to incidents of dignity and respect violations," I find this rule to be overly broad. There is nothing in the rule which suggests that protected communications are excluded from this rule. I find that, under these circumstances, employees would reasonably conclude that the rule requires them to refrain from engaging in certain protected communications if they are critical of the Respondent or other employees.

I also find that the rule set forth in "Standard 6.1- Respect (b)" suffers from the same infirmity. This rule directs employees to "avoid unwarranted negative criticism of colleagues . . . with other professionals." While the rule sets forth examples of conduct to be avoided, many of which are legitimate, because of the wide scope of the rule, employees could reasonably construe it to prohibit them from engaging in critical comments regarding the Respondent or its representatives. In *Claremont Resort & Spa*, 344 NLRB 832 (2005), the Board found a rule prohibiting "negative conversations about associates and/or managers" to be violative of Section 8(a)(1). Accordingly, I find that the above noted rules in the instant case are overbroad and violative of Section 8(a)(1) of the Act.

I find nothing unlawful in the remainder of the rules noted above. For the most part they direct employees to be accurate and respectful in communications about consumers, which is a term that the Respondent uses for clients it treats. I find that these rules address conduct that is concerned with actions that fall outside of the Act's protection. I find that employees would not reasonably construe the remainder of the Respondent's rules set forth above to prohibit Section 7 activity. *Hyun-*

[8] The employer referred to its employees as "partners."

dai America Shipping Agency, supra, slip op. at 2.

> Rule 16.15-Facebook, Blogs, Twitter, and any other Social Networks
>
> Except as otherwise provided under the National Labor Relations Act. . . . Nonpublic information relating to the company is the property of the company and the unauthorized disclosure of such information is forbidden. . . . Furthermore, any derogatory remarks made in reference to or in association with New Passages and/or clients, customers, products, employees, representatives, events, findings, opinions, policies or procedures in any public format whether verbal or written will be considered slander and therefore legal restitution may be sought.

The rule prohibits the unauthorized disclosure of nonpublic information relating to the Respondent. Such a broadly worded restriction would reasonably be construed to include discussions of wages, hours, and working conditions which employees are entitled to share with coworkers and third parties. Thus, the first paragraph of the rule is overly broad and violates Section 8(a)(1). *Hyundai America Shipping Agency*, 357 NLRB No. 80 slip op. at 1, JD slip op. at 12.

The rule additionally prohibits "derogatory remarks" about the Respondent's representatives and policies and procedure and threatens that violations of the rule "will be considered slander" and could result in possible legal action. I find that employees would reasonably construe this rule to prohibit them from discussing concerns about the Respondent's managers and policies that affect working conditions and thus would cause them to refrain from engaging in protected activities. *Claremont Resort & Spa*, supra. I also note that the Board recognizes that "Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute." *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007). Clearly, the Respondent's rule interferes with that protected right.

The "savings clause" noted above (Except as otherwise provided under the National Labor Relations Act. . . .) would arguably cancel the unlawfully broad language, but only if employees are knowledgeable enough to know that the Act permits employees to discuss terms and conditions of employment with each other and individuals outside of their employer. I find that employees would decide to comply with the Respondent's unlawfully broad restriction on their Section 7 rights, rather than undertake the task of determining the exact nature of those rights and then attempting to assert those rights under the savings clause. In *Allied Mechanical*, 349 NLRB 1077, 1084 (2007), the Board found " . . . an employer may not specifically prohibit employee activity protected by the Act and then seek to escape the consequences of the specific prohibition by general reference to rights protected by law." Accord: *Ingram Book Co*., 315 NLRB 515, 516 (1994); *McDonald Douglas Corp.*, 240 NLRB 794, 802 (1979). Accordingly, I find that the Respondent, by maintaining the facially overbroad provisions in Rule 16.15, violated Section 8(a)(1) of the Act.

New Passages' Compliance Reporting Facts

> Q. Who is to report violations of company policy or law?
>
> A . All personnel are required to promptly report all known or suspected suspected violations of wrongdoing. You may report violations to:
>
> Management
> Leadership
> Corporate Compliance Designee
> New Passages' Compliance Line
>
> Management staff will assist you reporting violations and will facilitate giving you appropriate device should you seek their assistance. If you feel uncomfortable with the above, personnel should report concerns directly to the New Passages' Compliance Line.

Relying on *Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 238 (1998) the General Counsel asserts that the requirement that employees report wrongdoing related to rules and policies which are overbroad regarding Section 7 activity is unlawful.

On its face, the policy set forth above does not in any way expressly touch upon Section 7 activity. Certainly, there are legitimate business reasons to encourage employees to report misconduct. The theory of the General Counsel is that because some of the Respondent's rules and policies are overbroad and violate Section 8(a)(1), the above-noted compliance policy could be used to enforce those rules and thus interfere with Section 7 rights. I do not agree with this theory. As the Board noted in *Palm's Hotel & Casino*, 344 NLRB 1363, 1368 (2005), when a rule does not explicit restrict Section 7 activity the fact that it could be read in such a fashion does not establish its illegality.

Greenfield Die & Mfg. Corp., supra, is distinguishable. In that case the employer sent a letter to the union suggesting that it instruct a union supporter to cease "from threatening and coercing employees who have clearly indicated to your agent that they not wish to participate in the organizing campaign" and by warning "Continued complaints of threatening and coercive conduct on the part of your agent . . . . May result in discipline up through and including discharge for, at least, insubordinate conduct." The Board found that the letter violated Section 8(a)(1) as the union supporter could reasonably understand the letter as an order to cease his prounion activities if they drew complaints from fellow employees and a warning that failure to do so could be regarded as insubordination. Id. at 238. In the instant case, as noted above there is nothing in the Respondent's policy that in any way touches upon Section 7 activity. Accordingly, I find that this policy does not violate Section 8(a)(1) of the Act and I shall dismiss this allegation in the complaint.

CONCLUSIONS OF LAW

1. The Union is now and, at all material times, was the exclusive bargaining representative in the following appropriate unit:

> All full-time and regularly scheduled part-time direct care workers and case managers employed by the Employer in its various group homes located in Bay, Saginaw, Clinton, Eaton, Ingham, Jackson, Washtenaw, Oakland, Macomb, Lapeer, Livingston, and Sanilac Counties in the State of Michigan but excluding all line managers, targeted case managers, directors, human resources personnel, nurses, administration assistance, and guards and supervisors as defined in the Act and all other employees.

2. The Respondent has violated Section 8(a)(5) and (1) of the Act by:

(a) failing to inform the Union of the basis for its decision to refuse to ratify the tentative contract between the parties from March 25 to April 4, 2013;

(b) unilaterally implementing its final contract offer to the Union at a time when the parties were not at a valid impasse in bargaining.

3. The Respondent has violated Section 8(a)(1) of the Act by maintaining the following facially overbroad rules and policies:

(a) a dress code prohibiting "shirts with commercial or political advertisements";

(b) a rule prohibiting solicitation or distribution of materials during worktime without clarification that such activities are permitted in the workday during periods when employees may legitimately engage in protected activities, such as breaks and lunch periods;

(c) confidentiality rules that prohibit its employees from discussing with nonemployees, or among themselves, wages, hours, and other terms and conditions of employment;

(d) rules cautioning employees about communicating about work on social networks that may "lead to incidents of dignity and respect violations" and directing employees to "avoid unwarranted negative criticism of colleagues . . . with other professionals.";

(e) a rule that provides "nonpublic information relating to the company is the property of the Company and the unauthorized disclosure of such information is forbidden. . . . Furthermore, any derogatory remarks made in reference to or in association with New Passages and/or clients, customers products employees, representatives events, findings, opinions, policies or procedures in any public format whether verbal or written will be considered slander and therefore legal restitution may be sought."

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Since the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing on May 5, 2013, its final offer without reaching a valid impasse, I shall direct the Respondent to restore the terms and conditions of the unit employees prior to May 5, 2013, and continue them in effect until the parties reach either an agreement or a good-faith impasse. This does not require the rescission of any ratification bonus or other benefits granted to employees since May 5, 2013.

The General Counsel seeks as an additional remedy an order requiring the Respondent to remit any back dues that would have been paid to the Union but for its unlawful actions. As noted above, the Respondent has continued to honor dues-checkoff authorizations and remit dues to the Union. The Respondent has only failed to remit dues for approximately two employees who have indicated they do not wish to pay union dues pursuant to the Michigan right to work law. The record does not indicate clearly whether these employees were hired after May 5, 2013, or were unit employees before that date. The Board has ordered dues reimbursement only when employees have individually signed dues checkoff authorizations. *Southland Dodge, Inc*. 205 NLRB 276 fn. 1 (1973). Since the record does not clearly reflect whether these employees have signed valid dues-checkoff authorizations, I shall not grant this remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Alternative Community Living Inc., d/b/a New Passages Behavioral Health and Rehabilitation Services, Pontiac, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain in good faith with the Union by refusing to communicate in a timely manner the basis for positions it has taken in collective bargaining.

(b) Unilaterally implementing its final contract offer to the Union at the time when the parties were not at a valid impasse.

(c) Maintaining the following facially overbroad rules and policies:

> A dress code prohibiting "shirts with commercial or political advertisements."
>
> A rule prohibiting solicitation or distribution of materials during worktime without clarification that such activities are permitted in the workday during periods when employees may legitimately be engaged in protected activities, such as breaks and lunch periods.
>
> Confidentiality Rules that prohibit its employees from discussing with nonemployees, or among themselves, wages, hours, and other terms and conditions of employment.
>
> Rules cautioning employees about communicating about work on social networks that may "lead to incidents of dignity and respect violations" and directing employees to "avoid unwarranted negative criticism of colleagues . . . with other professionals."
>
> A rule that provides "nonpublic information relating to the

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

company is the property of the Company and the unauthorized disclosure of such information is forbidden. . .
Furthermore, any derogatory remarks made in reference to or in association with New Passages and/or clients, customers products employees, representatives events, findings, opinions, policies or procedures in any public format whether verbal or written will be considered slander and therefore legal restitution may be sought."

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union as the exclusive bargaining representative in the following appropriate unit:

All full-time and regularly scheduled part-time direct care workers and case managers employed by the Employer in its various group homes located in Bay, Saginaw, Clinton, Eaton, Ingham, Jackson, Washtenaw, Oakland, Macomb, Lapeer, Livingston, and Sanilac Counties in the State of Michigan but excluding all line managers, targeted case managers, directors, human resources personnel, nurses, administration assistance, and guards and supervisors as defined in the Act and all other employees.

(b) Restore to the unit employees the terms and conditions of employment that were applicable prior to May 5, 2013, and continue them in effect until the parties reach either an agreement or a valid impasse in bargaining. Nothing herein shall require the rescission of any ratification bonus or other benefits granted after May 5, 2013.

(c) Within 14 days after service by the Region, post at its facilities in Bay, Saginaw, Clinton, Eaton, Ingham, Jackson, Washtenaw, Oakland, Macomb, Lapeer, Livingston, and Sanilac Counties in the State of Michigan copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 8, 2012.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., July 25, 2014.

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with Local 517 M, Service Employees International Union (SEIU) (the Union) by refusing to communicate in a timely manner the basis for positions we have taken in collective bargaining.

WE WILL NOT unilaterally implement changes in terms and conditions of employment in the absence of a valid impasse.

WE WILL NOT maintain the following overbroad rules that infringe on your right to engage in union and/or protected concerted activity:

A dress code prohibiting "shirts with commercial or political advertisements."

A rule prohibiting solicitation or distribution of materials during work time without clarification that such activities are permitted in the workday during periods when employees may be legitimately engaged in protected activities, such as breaks and lunch periods.

Confidentiality Rules that prohibit employees from discussing with nonemployees, or among themselves, wages, hours, and other terms and conditions of employment.

Rules cautioning employees about communicating about work on social networks that may "lead to instances of dignity and respect violations" and directing employees to "avoid unwarranted negative criticism of colleagues with other professionals.

A rule that provides "Nonpublic information relating to the company is the property of the Company and the unauthor-

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ized disclosure of such information is forbidden. . ..”
Furthermore, any derogatory remarks made in reference to or in association with New Passages and/or clients, customers, products, employees, representatives events, findings, opinions, policies or procedures in any public format whether verbal or written will be considered slander and therefore legal restitution may be sought.”

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union as the exclusive bargaining representative in the following appropriate unit:

All full-time and regularly scheduled part-time direct care workers and case managers employed by us in our various group homes located in Bay, Saginaw, Clinton, Eaton, Ingham, Jackson, Washtenaw, Oakland, Macomb, Lapeer, Livingston, and Sanilac Counties in the State of Michigan but excluding all line managers, targeted case managers, directors, human resources personnel, nurses, administration assistance, and guards and supervisors as defined in the Act and all other employees.

WE WILL restore to the unit employees the terms and conditions of employment that were applicable prior to May 5, 2013, and continue them in effect until we reach either an agreement or a valid impasse in bargaining with the Union. This does not require the rescission of any ratification bonus or any other benefits granted after May 5, 2013.

ALTERNATIVE LIVING, INC. D/B/A NEW PASSAGES BEHAVIORAL HEALTH AND REHABILITATION SERVICES

The Administrative Law Judge’s decision can be found at www.nlrb.gov/case/07-CA-099976 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.